IN THE SUPREME COURT OF THE UNITED STATES

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JOSE ERNESTO MEDELLIN, :

Petitioner :

v. : No. 06-984

TEXAS. :

- x

Washington, D.C.

Wednesday, October 10, 2007

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

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GEN. PAUL D. CLEMENT, ESQ., Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting Petitioner.

R. TED CRUZ, ESQ., Solicitor General, Austin, Tex.; on behalf of the Respondent.

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument this morning in Case 06-984, Medellin v. Texas.

Mr. Donovan.

ORAL ARGUMENT OF DONALD F. DONOVAN

ON BEHALF OF THE PETITIONER

MR. DONOVAN: Mr. Chief Justice, and may it please the Court:

The President and the Senate entered into three treaties, the Optional Protocol, the UN Charter, and the ICJ Statute, by which the United States agreed that it would comply with the ICJ's decision in any case to which it was a party. We now have such a decision, and the President of the United States has determined that the United States should comply.

Texas, however, tells this Court that it should tell the world that the framers left us a Constitution in which neither this Court nor the President nor maybe even Congress could ensure that the United States kept the promise that its elected representatives made to its treaty partners. Texas's position is directly contrary to the constitutional design.

JUSTICE SCALIA: That's not such an

outrageous proposition. You'd certainly acknowledge that the President and the Senate could not enter into a treaty that required the States to do something that was unconstitutional.

MR. DONOVAN: Yes. The Constitution --

JUSTICE SCALIA: So there would be the situation that presents the shocking situation you've just described. There is a treaty, but nonetheless it cannot be enforced domestically.

MR. DONOVAN: There would be constitutional -- there might be affirmative constitutional constraints on the enforcement of a treaty, but there are none here.

CHIEF JUSTICE ROBERTS: Who would enforce those constraints? The thing that concerns me about your position is that it seems to leave no role for this Court in interpreting treaties as a matter of Federal law.

Suppose, for example, that the International Court of Justice determined in this case its judgment was the same, but they added: As a matter of deterrence, we think the officers who failed to give consular warning should each be sentenced to 5 years in jail. That's the ICJ determination. Would this Court have a role in reviewing that judgment?

MR. DONOVAN: This Court would have a role

in reviewing that judgment, and here's -- here's the question. This Court has an obligation, has the authority, to say what the law is. In this case the obligation is, in fact, to comply with the judgment, itself.

CHIEF JUSTICE ROBERTS: Even if we determine --

MR. DONOVAN: And if that obligation --

CHIEF JUSTICE ROBERTS: Even if we determine, even if we determine that that judgment is based on a legal error?

MR. DONOVAN: The question -- that's the basis of submitting a dispute to a third-party dispute-resolution mechanism, yes.

CHIEF JUSTICE ROBERTS: So if the ICJ determined that the officers should each go to jail for 5 years, we would have no basis for reviewing that judgment?

MR. DONOVAN: Wel, that would be -- well, that would be a -- raise a separate obstacle. If I may answer the questions in turn, first --

JUSTICE GINSBURG: Does the ICJ ever issue a judgment of that character? It issues a judgment between two nations, two or more nations, and it is instructs the United States to do something. I'm not

aware of any -- any decision of the ICJ that says what a sentence should be for a particular individual.

MR. DONOVAN: That is correct. The ICJ decides disputes between nations, but those disputes may involve the nations' obligation as to specific individuals. In this case --

JUSTICE KENNEDY: Well, I'm still interested in the answer to the Chief Justice's hypothetical.

MR. DONOVAN: Well, as I say, there are two --

JUSTICE KENNEDY: Suppose the court acts beyond, clearly beyond, its jurisdiction?

MR. DONOVAN: Well, it's -- with respect, there's no suggestion here that the court has acted beyond its jurisdiction. Indeed, the President has determined otherwise.

JUSTICE KENNEDY: Could you answer the hypothetical, please.

MR. DONOVAN: But if the court, itself -- if the ICJ, itself, made a determination as to a dispute that is within its jurisdiction and that imposes an obligation that is within this Court's provenance to enforce, that is, that it determines the rights attributable -- enforceable within a court of justice, this Court would be enforcing the obligation to comply.

It wouldn't -- the fact that it diverged from the court's own interpretation, for example, here in Sanchez-Llamas, is not relevant to the treaty obligation that this Court is exercising --

CHIEF JUSTICE ROBERTS: I'm sorry. I'm still looking for an answer to the hypothetical. What would be the basis for this Court's reviewing the ICJ's determination that officers should go to jail for 5 years?

MR. DONOVAN: Because in that situation that may be beyond the Court's -- the executive power of the Court. What the Court would be doing is determining the rights attributable to --

CHIEF JUSTICE ROBERTS: The Court doesn't have executive power. It has judicial power. It's already exercised that judicial power in Sanchez-Llamas in determing the meaning of this treaty.

And I understood your position to be that we have no authority to construe the treaty in this case because a judgment was issued by the International Court of Justice.

MR. DONOVAN: The -- the question here is that the --the Court would be exercising its judicial authority to construe the United States's obligation to comply with the judgment. The nature of that

obligation, itself, could be one that would be enforceable, in this Court's words, "in a court of justice;" and that's the nature of this obligation. Mr. Medellin gets a review and reconsideration.

In the Chief Justice's hypothetical, that may well be an obligation that would be enforceable by other actors that would -- which would not be directly enforceable in a court as here.

JUSTICE BREYER: I thought --

MR. DONOVAN: It depends on the nature of --

JUSTICE BREYER: I thought the question -- and I apologize if I'm not paraphrasing it because I have my own. This has arisen frequently. Brussels has a treaty, and that treaty binds all the member nations, and supreme courts of various nations have come up against this problem:

What would happen if the Brussels court or the EU court insists under the treaty that we do something that violates our own Constitution? I think this is an example of that. And the answer typically has been: Well, we'd follow our own Constitution, at least if it was a violation, what the EU said, of fundamental human rights or destroyed some basic structural part of our Constitution.

And the question that I would have is,

doesn't that kind of approach -- not exactly but that kind of approach -- satisfy whatever problem there is in this respect here?

MR. DONOVAN: If there were -- if an ICJ --

JUSTICE BREYER: If the ICJ were to do something which it had never done, like, say, put everybody in jail for 50 years -- I don't know that there is such a thing -- but suppose they did, if they did, I guess that might violate something basic in our Constitution, in which case we wouldn't enforce it.

MR. DONOVAN: That's right and --

JUSTICE BREYER: If we took that approach --

CHIEF JUSTICE ROBERTS: Now --

MR. DONOVAN: If there --

CHIEF JUSTICE ROBERTS: Just to get back, you're conceding, I take it, whether the ICJ has done something like this before or not -- and we can debate whether what they've done in this case is precisely that -- there is a role for this Court in determining whether or not a judgment of the ICJ should be enforced.

MR. DONOVAN: There is surely because it's this Court that would be enforcing the obligation to comply. And just as a treaty cannot contravene an --

CHIEF JUSTICE ROBERTS: Just enforcing the obligation to comply or, as we have in this case,

determining the legal basis for the ICJ determination?

MR. DONOVAN: There are -- there are two different obligations here: There is an obligation under the Vienna Convention itself, and this Court has determined the dispositive effect of that obligation of a matter of U.S. law. But there's a different obligation. The President and the Senate agree to go to a third party, to go to the International Court of Justice, to resolve disputes. The very premise of that obligation is that we might disagree with the determination -- with the interpretation of the treaty, and we agreed in that circumstance to comply with the --

JUSTICE KENNEDY: Suppose in this case the President did the opposite -- the same facts only the President said to Texas, do not comply with this judgment.

MR. DONOVAN: Well, it -- that would -- it would be inconsistent with this Court's duty and obligation to comply, to enforce a treaty that the -- that the --

JUSTICE KENNEDY: So then the President's --

MR. DONOVAN: If the --

JUSTICE KENNEDY: -- determination is not conclusive.

MR. DONOVAN: Well, the President's

determination -- what the President has determined here is to enforce the treaty. He --

JUSTICE KENNEDY: My hypothetical is he's coming out the other way. He says don't follow this judgment. And you say he can't do that.

MR. DONOVAN: If --

JUSTICE KENNEDY: And I -- I think that that's not -- not consistent with your earlier position.

MR. DONOVAN: Oh, if the President here -- the -- if there's an obligation here to comply and, in the words this Court, it's "an obligation of a nature to be enforced in a court of justice," and here the obligation imposed by the ICJ and the Avena judgment is an -- is an obligation --

JUSTICE ALITO: Isn't the obligation --

MR. DONOVAN: -- which essentially --

JUSTICE ALITO: Isn't the obligation that the United States undertook when it signed the UN Charter the obligation to undertake to comply with ICJ judgments in accordance with its own constitutional processes, not necessarily that any ICJ decision would be regarded by any court in this country as binding Federal law?

MR. DONOVAN: Well, it would be -- that -- that's exactly right. What the -- what the ICJ -- what

U.S. did is undertake to comply. So the question is, what is the nature of the obligation imposed?

JUSTICE GINSBURG: If you had a --

MR. DONOVAN: It might have obligations --

JUSTICE GINSBURG: If you had a treaty on the recognition and enforcement of judgments, mutual recognition and enforcement, then we would enforce the judgment that we agreed to enforce by treaty. We wouldn't look behind it to see if we agreed with it on the merits.

Are you saying that this undertaking, this agreement to submit to the compulsory jurisdiction of the ICJ gives the judgment in the particular case, although not precedential effect, the counterpart to full faith and credit?

MR. DONOVAN: That's exactly the effect of the judgment.

JUSTICE SCALIA: It's self-enforcing. I thought you --

MR. DONOVAN: It's --

JUSTICE SCALIA: I thought you -- you think this treaty is self-enforcing. You don't really need the President's order here.

MR. DONOVAN: Well, if the -- whether or not the treaty obligation is self-executing or

self-enforcing goes to the nature of the obligation. If the ICJ said -- if a treaty or an ICJ judgment said, go pass a statute, that's obviously directed to Congress. If it said cease hostilities, that's directed to the President. But as this Court has said, when a treaty or, by extension, a treaty obligation to comply with a judgment is --

JUSTICE STEVENS: May I --

MR. DONOVAN: -- of a nature to be enforced --

JUSTICE STEVENS: May ask this question? I don't think you've answered the Chief Justice's original hypothetical. It's easy, of course; they cannot compel us to violate our Constitution by a judgment of their kind. But what about the hypothetical that they said the sentence for this man should be 5 years, not just there be an investigation to see if he's been prejudiced. Would we have to follow that judgment?

MR. DONOVAN: Well, in that situation, if it was a judgment rendered in a case to which we had --

JUSTICE STEVENS: In this very case.

MR. DONOVAN: That would be --

JUSTICE STEVENS: This very case. Supposing they had said the judgment is that Medellin should spend 5 years in jail and no more. Would we have to honor

that judgment?

MR. DONOVAN: In the first instance, yes, the Court would honor that judgment as an obligation to comply. But remember that there are --

JUSTICE GINSBURG: Then it becomes --

MR. DONOVAN: -- some constraints that --

JUSTICE GINSBURG: Then it becomes a penal judgment, and I thought the rule was that no country forces -- enforces another country's penal judgment.

MR. DONOVAN: Well, that would depend on the -- if -- how you construed the obligation to comply.

JUSTICE GINSBURG: But if we say --

MR. DONOVAN: In this case, we have --

JUSTICE GINSBURG: -- this man goes to jail for 5 years, it seems to me that's a penal judgment.

MR. DONOVAN: If that was the nature of the dispute that the United -- that is, of course, not the nature of the dispute that the United States --

JUSTICE ALITO: What if they say --

MR. DONOVAN: But if he --

JUSTICE ALITO: -- he goes to jail for no time at all? They say that the remedy for these violations, in order to deter future violations, should be that the charges should be dismissed and any future prosecution should be barred. Would that be

automatically binding?

MR. DONOVAN: Well, the question is, is it binding in the first instance because the -- there's an obligation to comply? That doesn't say anything about, for example, Congress's ability to repudiate that obligation to comply, just like it has the obligation -- the authority as a last-in-time rule, pursuant to the last-in-time rule, to repudiate any treaty obligation. But the framers wanted treaties to be enforced in the first instance when they were susceptible of judicial enforcement, and if the ICJ renders a judgment pursuant to our treaty obligation to submit disputes, that is of a nature to be judicially enforced, then the Court --

CHIEF JUSTICE ROBERTS: Is the answer to --

MR. DONOVAN: -- would be exercising --

CHIEF JUSTICE ROBERTS: Is the answer to either my or Justice Stevens's hypothetical then, yes, we do have to enforce an ICJ judgment of that sort?

MR. DONOVAN: You would enforce an ICJ judgment that did in fact -- that was of a nature to be enforced in -- in a judicial proceeding.

CHIEF JUSTICE ROBERTS: But --

JUSTICE SCALIA: This is not of a nature to be enforced in a judicial proceeding in Texas. Texas has procedural rules that disable the Texas court from

complying with the ICJ judgment here. Are you telling me that the ICJ judgment empowers either Federal or State courts to do things which -- which their laws do not permit them to do?

MR. DONOVAN: If the -- both the President's determination and the Article 94 obligation which result in the Avena judgment are Federal law. The President's determination pursuant to his State court authority and Article II authority and the -- and the Avena judgment pursuant to the treaty --

JUSTICE SCALIA: And -- and do you know of any other Federal law that -- that interferes in the -- in the procedures of State criminal courts, directs them as to what -- what procedures they have to have?

MR. DONOVAN: The Court has -- when there's a Federal procedural rule that preempts a State procedural rule, the Court allows that to preempt as a Federal rule all the time.

JUSTICE SCALIA: Really?

MR. DONOVAN: That's a function of --

JUSTICE SCALIA: Where? I don't know what you're talking about unless you're talking about constitutional requirements. Of course, those are binding on the States. But you're saying that the Federal Government can prescribe State court procedures

and authorize State courts to do things which -- which the State government does not authorize them to do?

MR. DONOVAN: The Federal Government can prescribe rules of decision that preempt Federal rules and require the cases that other -- that would not otherwise be heard to be heard. That's --

JUSTICE SOUTER: Well, you're -- you're -- as I understand it, in order for you to prevail on that point, the only -- the only conclusion that has to be drawn, as I understand it, is that the Texas courts have subject matter jurisdiction of this kind of -- of order, and that the bar that Texas is asserting is simply, in effect, a procedural bar; and, therefore, in order for this Federal rule to preempt the State bar is not to give the State courts jurisdiction they don't have, but to remove a bar to the exercise of their jurisdiction that State law, absent preemption, would impose; is that correct?

MR. DONOVAN: That's correct. That's right. It removes a bar by preempting that bar.

JUSTICE ALITO: You just --

MR. DONOVAN: If I may --

JUSTICE ALITO: You just said that the Avena decision is Federal law. How is the -- how is the Avena decision itself a Federal law?

MR. DONOVAN: Well, the Avena decision --

JUSTICE ALITO: It's not a statute. It's not the Constitution. It's not a statute. It's not itself a treaty.

MR. DONOVAN: The Avena decision has the force of Federal law, either by virture of the treaty obligation to comply with it under Article 94-1, or the President's determination under his Article II authority to require -- to determine that the United States should comply. And by either one of those vehicles, in effect the judgment becomes the --

JUSTICE GINSBURG: You didn't mention the --

MR. DONOVAN: -- the instrument by which it must be complied with.

JUSTICE GINSBURG: You didn't mention the Optional Protocol which is -- is where the United States gave its promise. It voluntarily accepted this jurisdiction. It didn't have to.

MR. DONOVAN: Well, that's right. It's the combined force of the Optional Protocol and the UN Charter and ICJ statute.

And if I may reserve the rest of my --

CHIEF JUSTICE ROBERTS: Well, why don't -- why don't you take 5 extra minutes? And we'll give you your rebuttal time.

If the Avena judgment is binding as Federal law, is it your position, though, that the -- this Court has no authority to review the content of that Federal law -- the judgment? Our choice is simply enforce it?

MR. DONOVAN: The relevant Federal law here is the Federal law that says that the United States will comply pursuant to its voluntary choice to submit these -- this --

CHIEF JUSTICE ROBERTS: So we have no --

MR. DONOVAN: I'm sorry -- to the ICJ.

CHIEF JUSTICE ROBERTS: We have no authority to review the judgment itself, even though the judgment will have the effect as Federal law of preempting the State law in this instance?

MR. DONOVAN: Well, you are in effect applying Federal law in the form of the obligation to comply. That's different than applying the Vienna Convention --

CHIEF JUSTICE ROBERTS: Excuse me, but your position is not that we are applying the obligation to comply, because we interpreted that in Sanchez-Llamas and came to the exact same conclusion as the ICG here. What you're saying is it's different here because the operative law is the judgment.

MR. DONOVAN: The operative -- it's

different because on the one hand, in Sanchez-Llamoas, this Court was interpreting the underlying obligation under the treaty. That is, the immediately applicable instrument. But, as with respect to any judgment, a court's -- and this Court has affirmed with respect to international adjudications, that it will enforce an international adjudication.

JUSTICE KENNEDY: Can this court interpret the meaning of the Avena judgment if it's ambiguous? For instance, it said that a number of Mexico nationals have not received a hearing. It didn't say all of them. And I have a problem, incidentally, because I think Medellin did receive all the hearing that he's entitled to under the judgment anyway.

Can we interpret the judgment in that respect if it's ambiguous, not clear?

MR. DONOVAN: Wel, in this case, the court would be -- a court applying the Avena judgment either by virtue of the Optional Protocol in 94-1 and the President's determination would be in effect applying Federal law. We think the judgments --

JUSTICE KENNEDY: Can we interpret the judgment?

MR. DONOVAN: Well, to the extent necessary to apply Federal law in the form of a judgment --

JUSTICE KENNEDY: And can the President displace our authority to do that?

MR. DONOVAN: The President would not displace the Court's authority to interpret a judgment, no. What the President has said is that the judgment shall be enforced. That's an independent source of Federal law under his Article II --

CHIEF JUSTICE ROBERTS: So if he determines that the judgment should not be enforced and this Court determines, based on our construction of the treaty and the judgment that it should be enforced, which determination controls?

MR. DONOVAN: This Court -- to the extent that this is Federal law, this Court has the ultimate authority to determine whether or not it should be complied with. And this Court -- the framers have made treaties supreme Federal law specification so they could be judicially enforceable.

CHIEF JUSTICE ROBERTS: Well, if we have the authority to determine whether the treaty should be complied with in the face of a presidential determination, why don't we have the independent authority to determine whether or not it should be complied with at a matter of Federal law without regard to the President's determination?

MR. DONOVAN: You have two separate and independent sources of authority here. Without the President's determination, this Court pursuant to the mandate in the Supremacy Clause would apply the treaty obligation to comply with the judgment because the nature of the judgment is such to be enforced in a court of justice. In this instance, you have an entirely independent source of authority because the President in the exercise of his Article II authority has determined that it's in the paramount interest of the United States to comply. That becomes a second object.

Of course, it would be a judicial function to interpret the -- interpret those obligations, interpret what the President meant. But in this case it's crystal clear. The Avena judgment is mandatory and prospective. The President is determined that it be enforced, and that would be the result even had the President not acted pursuant to the mandate of the Supremacy Clause, which makes treatise enforceable Federal law.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Donovan. We'll give you 5 minutes for your rebuttal.

General Clement.

ORAL ARGUMENT OF GEN. PAUL D. CLEMENT.

ON BEHALF OF THE UNITED STATES AS
AMICUS CURIAE SUPPORTING THE PETITIONER
GENERAL CLEMENT: Mr. Chief Justice, and may it please the Court:
JUSTICE SCALIA: You don't agree with the last statement.
GENERAL CLEMENT: I don't think I do agree with that and there's a couple of the issues here where we take a slightly different take. Obviously we feel the President's determination here that we will comply with the Avena judgment is a critical element in why there's an enforceable obligation --
JUSTICE SCALIA: We would have no -- according to you, we would have no obligation to enforce this judgment but for the President's action?
GENERAL CLEMENT: That's correct, Justice Scalia. Now, obviously, Mr. Donovan and his clients could get here and ask you to enforce the judgment of it own force without the President's determination and that would ultimately be a question for this Court. We of course --
JUSTICE SCALIA: We could decide to go back, too. But would we have any authority to do it?
GENERAL CLEMENT: I hope that you wouldn't and we would be up here saying don't, because if you

look at Article 94 of the UN Charter as a whole, it has two components and I think it makes clear why the President's intervening role here is important. 94-1 says that we undertake to comply with our obligations, with our obligations to comply with the judgment. But 94-2 says what happens when a country doesn't do that. It's a matter for the Security Council. And that, of course, I think necessarily implies that countries do retain the option to put themselves out of compliance with an International Court of Justice judgment.

JUSTICE GINSBURG: But that would take an action by somebody in the country.

GENERAL CLEMENT: Exactly, Justice Ginsburg, and I think that --

JUSTICE GINSBURG: Here that hasn't -- that hasn't happened. 94 would never be triggered because we haven't said we're breaking our promise, we're not going to comply.

GENERAL CLEMENT: Absolutely, and that's why we're supporting Mr. Donovan.

JUSTICE SCALIA: Wait a minute. In order to get it to the Security Council, you have to take some affirmative action not to comply? It's just not enough simply not to comply?

GENERAL CLEMENT: Whether it's an omission

or a commission I don't think is the point, Justice Scalia. My point --

JUSTICE SCALIA: I thought that was tte point of Justice Ginsburg's comment, that there had been no decision not to comply. Don't you need an affirmative decision to comply?

GENERAL CLEMENT: I didn't take that to mean --

JUSTICE GINSBURG: If you don't -- if you don't comply, you don't comply. But we -- certainly not -- in that situation here, the President said the United States agreed that it would submit to the binding jurisdiction for one case only, and we are bound by that judgment and I'm going to enforce it.

GENERAL CLEMENT: I agree, i think the omission-commission --

JUSTICE SCALIA: I know you agree, but it depends on whether it's up to the President to make that call. Usually when we have treaties that are not self-enforcing the judgment of whether that international law obligation shall be made domestic law is a judgment for the Congress.

Congress passes a law to enforce the treaty, and you're telling us that, well, we don't need the Congress; the President can make a domestic law by

writing a memo to his attorney general.

GENERAL CLEMENT: Well, Justice Scalia, let me take that in turn. Let me just first close the discussion of what happened here by saying the reason I think the commission-omission distinction doesn't have much purchase here is because the President did make a determination that we would comply. And I think if you ask the question who makes the determination as to whether we're going to default on our international law obligations or comply, especially vis-a-vis the UN, the answer to that question is quite clear: It's the President, and Congress has acquiesced in that with the UN Participation act at 22 U.S.C. 287.

CHIEF JUSTICE ROBERTS: What if the President had said, we're going to comply with this judgment, but in a different way than the ICJ determined. We're going to comply by examining in each case whether there's already been a determination of prejudice, and if there has then there's no further review, but if there hasn't then there'll be further review. Would that be binding as a matter of Federal law?

GENERAL CLEMENT: It depends exactly what form that would take. I think part of the problem -- I'm stumbling with that question --

CHIEF JUSTICE ROBERTS: It's the same as a memorandum just like -- it's a memorandum just like the one we have here.

GENERAL CLEMENT: And what does it suggest that is supposed to be done with tne end product of that determination?

CHIEF JUSTICE ROBERTS: It says that if there has already been -- the State courts are to determine if there's already been a determination of prejudice in the case, and if there has there's to be no further review. But if they determine there hasn't, there is to be further review. That's different than the ICJ's judgment, which suggests there should be a new determination in every case.

Is that -- does that have the same status as the memorandum here?

GENERAL CLEMENT: I would say that it wouldn't -- I would say that it wouldn't, as you suggest, not fully comply and not fully discharge with our obligation.

But the extent to which we did and purported to be doing that under compliance with the judgment, it would have the same force as providing the rule of decision, which, to get back to Justice Scalia's question, especially in a context like this, is not so

unprecedented. It is not materially different from when the President supplies the rule of decision in the pre-FSIA practice by making a determination, binding on the courts State and Federal, that somebody has sovereign immunity.

JUSTICE ALITO: If we agree with you, would the effect be that the President can take any treaty that is ratified on the understanding that it's not self-executing and execute the treaty and give it force under domestic law?

GENERAL CLEMENT: No, Justice Alito, I don't think the theory would sweep that broadly, and I think that --

JUSTICE ALITO: Well, why would it not?

GENERAL CLEMENT: Well, first of all, there's obviously a limiting principle in our theory, which is to say that the President can't take any action pursuant to this which is inconsistent with other constitutional obligations.

CHIEF JUSTICE ROBERTS: But he can -- he can take action that's inconsistent with the determination of Federal law by this Court?

GENERAL CLEMENT: No, Mr. Chief Justice, I don't think that's true.

CHIEF JUSTICE ROBERTS: I thought we

determined in Sanchez-Llamas that the treaty did not mean what the ICJ said it means in this case.

GENERAL CLEMENT: That's exactly right as to the Vienna Convention. But this case raises a question, not about the proper interpretation of the Vienna Convention, because as you remember we were four-square with this Court on its interpretation of the Vienna Convention in Sanchez-Llamas. The relevant treaties here the Optional Protocol and the UN Charter, and the question here is not the force of -- of the Avena judgment as precedent --

CHIEF JUSTICE ROBERTS: Do you doubt that the judgment here is based on a determination of the Vienna Convention that's exactly the opposite of what we determined last year?

GENERAL CLEMENT: No doubt at all, Mr. Chief Justice. And we think with respect to anyone but the 51 individuals that are covered by the judgment that of course this Court has the final word on the interpretation of the Vienna Convention.

JUSTICE SCALIA: They were not parties to it. What do you mean, "covered by the judgment?" Is this some -- some new kind of new kind of jurisdiction? If you're named in a suit by somebody else, you somehow acquire rights under that suit? I

don't know of any such principle.

GENERAL CLEMENT: Justice Scalia --

JUSTICE SCALIA: These people were not parties to the -- the countries were parties to the judgment.

GENERAL CLEMENT: Of course the countries were parties, but these 51 individuals' claims were specifically adjudicated. Why were they specifically adjudicate? Because they were effectively -- the claims were espoused by the Mexican Government. That system --

JUSTICE GINSBURG: General, can we just clarify something which I think is important? Justice Scalia suggested that this wasn't self-executing. The State Department with respect to the Vienna Convention itself told Congress very clearly: You don't have to do anything; this is self-executing. And then the protocol says: We the United States agree to accept the jurisdiction of the ICJ in a certain class of cases. And Congress ratified that, too. So I don't think that self-executing has anything to do with this case.

GENERAL CLEMENT: Well, Justice Ginsburg, I think that reflects that self-executing is one of those words that people use to cover a lot of different meanings; and I think in its most correct sense, you're right to say that the Vienna Convention is

self-executing.

So there didn't have to be legislation before Texas and its local officials were obligated to provide notice in this case; and of course, it's their default on that treat obligation by the State and local officials that has us in this predicament in the first place.

Now, there's another meaning of "self-executing", or maybe it's a misuse of the term, to say whether it gives rise to individually enforceable rights in court without more. And we do take the position that if the President had done nothing, and certainly if the President had said we're not going to comply, we're going to respond to this ICJ judgment the way we did with the Nicaragua judgment, we don't think that this judgment would be enforceable as of its own terms.

JUSTICE GINSBURG: But in Nicaragua the United States took the position from day 1 that the ICJ had no jurisdiction over the case. So the absence of jurisdiction is always an exception to the obligation, even within the United States, to give full faith and credit. If the court had no jurisdiction, another State doesn't have to give full faith and credit. But if it does have jurisdiction, then the obligation kicks in.

GENERAL CLEMENT: That's absolutely right, and that gets back to the basic principle of reviewing foreign judgments; and it's not that this Court is disabled from its judicial role. It's just the judicial role here is not a straight-up question of the interpretation of the Vienna Convention. It's a question of what effect to give the judgment that's been effectively validated by the executive branch. And there's two things --

JUSTICE STEVENS: You're arguing it's just the normal choice of law problem, that even though the judgment's clearly wrong on the matter of international law, if the court had judgment -- had jurisdiction to enter the judgment, we must treat it as binding?

GENERAL CLEMENT: That's -- that's right, Justice Stevens. As Justice Ginsburg put it --

JUSTICE STEVENS: That's provided that we regard these individuals as though they're tantamount to the parties to the judgment itself.

GENERAL CLEMENT: I think that's right, and certainly our obligation under that judgment as the executive branch sees it is to these 51 individuals as their claims have been espoused by --

JUSTICE KENNEDY: Suppose the President had reached the contrary conclusion, a hypothetical we put

earlier. Supposed the President had told Texas, do not follow this judgment?

GENERAL CLEMENT: Then I'd be on that side of the podium, Your Honor. I mean, we would take the position that the President's authority here is, in his view of this, is a necessary step; and that seems to be --

JUSTICE KENNEDY: I agree that we should give that determination great weight, but that's something quite different from saying that he can displace the authority of this Court on that issue of law.

GENERAL CLEMENT: Oh, but the -- the President can't displace the role of this Court. It's just that the role of this Court in a situation where there's been a judgment and the executive branch has viewed that judgment as something we should comply with, then the role of this Court is limited to deciding whether there was jurisdiction to issue that judgment in the first place; and then the secondary role of this Court would to be to say, does the rule of law embodied by that judgment violate the Constitution. And that's why the answer to the Chief Justice's original hypothetical, about a sentence to 5 years for guards that had no notice -- that's a different case.

But here there's no colorable argument that the -- that the judgment here and what's embodied in it lies outside the power of the Federal Government as a whole to adjudicate and to put as an obligation on the States.

JUSTICE SOUTER: Mr. Chief Justice, may I ask a further - may I ask a further question?

CHIEF JUSTICE ROBERTS: Yes.

JUSTICE SOUTER: Let me try one other variation to make sure that I understand your argument. What if the President of the United States had said this judgment, the Avena judgment, will not be enforced, and this Court interpreted the Avena judgment as binding, as providing a rule of decision and a rule of decision which was entitled to respect by Texas?

Would this Court's authority to make that declaration and issue a judgment to that effect be displaced by the President's determination that it would not be that the Avena judgment would not be enforced?

GENERAL CLEMENT: Of course not, Justice Souter. That would just be like cases that unfortunately happen, where we would take a position that the judgment on its own is not binding and you would reject that position and that would be the law of the land.

JUSTICE SOUTER: Okay.

GENERAL CLEMENT: We don't suggest that we wouldn't comply with a judgment of this Court, accepting Mr. Donovan's first theory that the President's role here is unimportant.

JUSTICE SOUTER: So --

GENERAL CLEMENT: -- but we do think, we stick to our view that the President's role here makes this an easier case and is in our view dispositive.

JUSTICE SOUTER: But it does follow then from what you've said that if we take exactly the position that I outlined in my hypo, we could avoid the entire question of presidential authority.

GENERAL CLEMENT: You could. I think another route, of course, that would be available to you is to simply say: Here we have a judgment and we have the President effectively espousing the judgment, and in those cases we don't have to worry about what would happen if we didn't have one or the other.

JUSTICE SOUTER: That's in effect a judicial version of one of the variants in Justice Jackson's hypo in the Steel case --

GENERAL CLEMENT: Exactly.

JUSTICE SOUTER: He's talking about the President and Congress; we're talking about the

President and the Court.

GENERAL CLEMENT: Right.

JUSTICE SOUTER: Yes.

JUSTICE SCALIA: The President espousing the judgment -- Texas takes the position that this memorandum has -- has no legal effect; it's a memorandum from the President to the -- to his attorney general. It's not a directive to the States. In fact, it even refers to pursuant to the principles of comity, which suggests, you know, do it if you want to be cooperative, don't do it if you don't want to be cooperative.

What is your response to that? And would it be enough if the President simply wrote a memorandum to himself saying that, I think this is the way that the -- that the judgment of the ICJ should be enforced? He doesn't have to tell Texas. He can just tell his attorney general?

GENERAL CLEMENT: Well, Justice Scalia, I think there's two questions there. I'd like to try to answer them both. One is, what degree of formality is required? And we would say that if you look to historical practice, this is not something where you a need a high degree of formality. So look to the executive agreement that this case -- this Court gave its positive effect to in Belmont and Pink. It was an

exchange of diplomatic letters, nothing more. Look to the executive determination that this Court give dispositive effect to, dismissed the lawsuit completely in Ex Parte Peru. It was a letter from the undersecretary of state to the attorney general.

Going back to the very beginnings of the nation, look at the extradition of Thomas Nash. What was the form of the President's determination we would extradite him? A letter from the secretary of state to Judge Bee in South Carolina.

CHIEF JUSTICE ROBERTS: In none of those cases were we talking about a determination contrary to a legal determination by this Court concerning the scope of powers under the treaty.

GENERAL CLEMENT: Well, with respect --

JUSTICE KENNEDY: And in Nash he was being held under Federal custody. So Nash is just inapplicable here.

GENERAL CLEMENT: Well, I don't think Nash is inapplicable, Justice Kennedy; I think it is on all fours.

JUSTICE KENNEDY: Of course, Nash is just a wonderful speech by Marshall anyway; it's not an opinion.

GENERAL CLEMENT: But it is a wonderful

speech, and I really do think you should take a look at that speech. If you want to find it, it's actually appended to volume 18 of the U.S. Reports. And I think you should look at that speech before rejecting our position here, because it really is on all fours in that there you had a treaty obligation duly approved by the Senate, and there was a question: Do we need an act of Congress before the executive can extradite somebody? And Marshall I think put the law exactly right in that case when he said: Sure, Congress can make a determination and if it does, that's the end of matter; but absent the congressional determination, the President has the authority to extradite Nash.

Now, that's a situation where somebody's personal liberty was at stake. So I would say that in some respects it's a fortiori that in this case what's at issue is simply recognizing that there's binding Federal law here, that I think if the Texas court had recognized that it was binding Federal law, it would have applied under their own State procedural default law.

Now, just to finish up, and then I will sit down, there's a second part of your question, Justice Scalia, which was addressed to what does the reference to comity mean. Obviously, from the very beginning in

this case we have taken the position in this Court that the President's memorandum directs the State courts, in its words, to give effect to the Avena judgment -- not decide whether you want to give it effect based on your State law of comity, but give effect to the judgment.

I think if you actually look at the law of comity, one of the things that it talks about is comity is really what the courts should do in the absence of a controlling view from one of the political branches. Here the President has made clear, it's clear to me what the answer is applying comity, which would be to give effect to the judgment.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, General.

Mr. Cruz, by my count we'll give you an extra 10 minutes.

ORAL ARGUMENT of R. TED CRUZ,

ON BEHALF OF THE RESPONDENT

MR. CRUZ: Mr. Chief Justice, and may it please the Court:

The entirety of the United States's argument is predicated on the idea that the President's two-paragraph memorandum is in and of itself binding Federal law.

JUSTICE SOUTER: Well, that's the -- that's

the argument, but your brother the Solicitor General has conceded that if we take the position in this case that there is a -- a rule of decision that should be respected in this Court and, hence, the subject of a judgment to Texas that, among other things, would suspend Texas's procedural bar law -- that that would obviate the question of presidential power.

MR. CRUZ: There's no doubt, if the Court decided it on the ground that Avena was a binding judgment, the President's order would be unnecessary.

I would note the United States strenuously disagrees with that proposition. And, indeed, the United States explicitly disclaims these treaties as the source of his authority; in fact, expressly agrees with this Court's decision in Sanchez-Llamas.

JUSTICE BREYER: Maybe you could spend a minute explaining that, because, as I read the Constitution, it says all treaties made, or which shall be made, under the authority of the United States shall be the supreme law of the land, and the judges in every State -- I guess it means including Texas --

(Laughter.)

JUSTICE BREYER: -- shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding.

Now, as I understand it, the United States entered into a treaty. That treaty said we will follow the interpretations and the judgments of the International Court of Justice in respect to the Vienna Convention.

And that Court did make a judgment in that respect, in respect to this client, and it said: Our judgment is that Texas, or someone in the United States, must redo the procedural hearing simply to see whether, in deciding whether there's prejudice or whether there's a procedural default, full account is taken of the importance of the Vienna rights. That's what we're talking about.

It's a judgment of the court. The United States has promised to follow that judgment of the court. The Constitution says, since it promised by treaty, that is the law; and the law binds the States.

That may be simple-minded, but I'd like to hear what the answer to that, rather, chain of logic is -- chain of law.

MR. CRUZ: Certainly, Justice Breyer. Texas, of course, does not dispute that the Constitution, laws, and treaties are the supreme law of the land. And Texas statutes must give way to any of these three.

The President's memorandum is none of those three.

JUSTICE BREYER: I was not talking --

MR. CRUZ: And, with respect --

JUSTICE BREYER: -- about the President's memorandum at the moment. And to be -- to disclose fully what I'm thinking, I'm thinking that maybe if a president disagreed in such a thing, some kind of a question -- I'm not sure what -- would be presented.

But whatever "what," I don't worry about that "what" here, because the President, too, agrees.

MR. CRUZ: Justice Breyer, the -- the answer to your question is the Avena decision is not a judgment in the sense we recognize judgment in U.S. courts for six separate reasons.

JUSTICE BREYER: No, forget whether we recognize it this way as a judgment. I'm saying we promised in the treaty to follow that thing. Call it whatever name you want. We promised to follow that thing, which I have in front of me -- excerpts of which -- called an Avena something. And we know what that says. I'm just looking to see what they call it. They call it -- well, you tell me what they call it. They call it -- it is not called the word "judgment." It's called: "The appropriate reparation in this case

consists of the obligation of the United States to" -- and then they listed it.

So I take it we have promised to carry out that obligation by treaty.

MR. CRUZ: Except that when the Senate ratified the Optional Protocol, it made clear that the Optional Protocol was not self-executing. Indeed, a point Mr. Donovan made in his argument --

JUSTICE BREYER: What are the words that the Senate said? Because, when you say "self-executing," the easiest way for me to understand that is the Constitution means what it says.

But there happened to be a few instances where the nature of the obligation or the intent of the party makes it very difficult to enforce it as a binding judgment of a court. That is not this case.

MR. CRUZ: This -- this Court has made clear for 200 years the Senate can ratify a treaty and yet leave it not self-executing in the sense that it is not enforceable in U.S. domestic courts.

JUSTICE BREYER: Oh, and so if they did that, now, will you quote the words or give me the reference where the Senate said: Although we entered into this and although we ratify it, we're not going to do it --

MR. CRUZ: Well --

JUSTICE BREYER: -- unless you --

MR. CRUZ: The text of the treaty, itself, is the first place to look. The text of Article 94 of the UN Charter provides that the remedy is that the party may have recourse to the Security Council.

JUSTICE GINSBURG: That's after there's a breach, but we -- let's stick to the protocol, the Optional Protocol -- optional. The protocol says:

We accept the compulsory jurisdiction of the ICJ. "Jurisdiction" means power. We agree that in cases of this character, Vienna Convention violation cases, we submit to the jurisdiction of X tribunal, the ICJ.

What is there that needs execution about that? Congress said yes, the United States, the Executive Branch of the United States decides that it's a good idea to submit to the -- to the jurisdiction of the ICJ. We ratify that.

And I don't see anything left for Congress to do. It said the United States can submit to the jurisdiction of the ICJ.

MR. CRUZ: "Jurisdiction" in that sense is not "jurisdiction" in the sense of a U.S. court. Rather, it is an international obligation that is to be

resolved through political and diplomatic avenues. And the best example of that --

JUSTICE SCALIA: It just means we agree that the case can go before the court.

MR. CRUZ: Exactly.

JUSTICE SCALIA: And we will be a party before the court. Isn't there some doubt whether the -- the Senate and the President, together, can -- can take away from this Court the power and responsibility to decide what the treaty obligations of the United States are?

MR. CRUZ: Justice Scalia, I --

JUSTICE SCALIA: Isn't there some problem there?

MR. CRUZ: I would go further than some doubt, and I would say that if the treaty purported to give the authority to make binding adujudications of Federal law to any tribunal other than this Court, that it would violate Article III of the Constitution.

JUSTICE BREYER: Fine. Then, are you saying there are -- there are 112, I believe, treaties in which we've entered into promises that we're going to follow what an international tribunal said. Somebody looked up, I saw on the Internet, that at this moment there are approximately 116 regulatory entities in the

world where we've entered, or others have entered into, regimes, where there are various adjudicatory tribunals of different kinds, mostly commercial, that bind us.

And is your view: All of these thousands, perhaps, or hundreds, anyway, of treaties are unlawful, and that our promises are not enforceable, because there's a constitutional question?

MR. CRUZ: There are hundreds of treaty obligations that this nation is committed to that are not self-executing, that don't immediately have force --

JUSTICE BREYER: No. No. I'm thinking that are self- executing. I'm thinking that there are -- like WTO, NAFTA. We can go down a long list of instances where the United States has promised to follow the decisions of tribunals that are not Article III courts and to put them into effect at once.

MR. CRUZ: If -- if --

JUSTICE BREYER: And I wonder, without further ado, now, are you saying that all those are unconstitutional?

MR. CRUZ: In -- in those instances --

JUSTICE BREYER: "Yes" or "no"? I'd appreciate a "yes" or "no" answer.

MR. CRUZ: No. No, we are not saying that.

JUSTICE BREYER: Okay.

MR. CRUZ: In those instances, the bodies in question are not making definitive interpretations of what Federal law is. The best illustration of this is the example Mr. Donovan used in his opening argument where he said, if the ICJ said to the United States cease hostilities, that would be directed to the President.

Now, under Mr. Donovan's argument, that's a clear directive. The United States is bound by treaty, and apparently the Federal courts could order the President to cease hostilities if that was the instruction of the ICJ.

JUSTICE BREYER: I'm sorry. What I don't understand about this is that I thought that the ICJ in this case interpreted the treaty. That's not Federal law. That's the treaty. And it said that the treaty --

MR. CRUZ: The treaty is Federal law, Justice Breyer.

JUSTICE BREYER: Oh, then I don't understand you because the WTO interprets a treaty. It interprets a treaty that binds the United States, just like the ICJ is interpreting a treaty that binds the United States. So what's the difference?

MR. CRUZ: The nature of this treaty, every -- every position -- the United States State

Department at the time it was introduced, the Senate, and every member of the Senate who discussed it, understood that the decisions of the ICJ would not have binding effect in U.S. courts. And that is identical to the understanding of every single nation --

JUSTICE KENNEDY: And what you are saying -- and this has been the law --

JUSTICE STEVENS: May I ask a question, please?

JUSTICE KENNEDY: Go ahead.

JUSTICE STEVENS: It's critical to me to understand the effect of the judgment, and you said there are six reasons why it's not an ordinary judgment. I really would like to hear what those reasons are without interruption from all of my colleagues.

(Laughter.)

MR. CRUZ: I would be happy to provide those, Justice Stevens. The first reason is because the Optional Protocol is not self-executing, so it does not have force in United States courts.

The second reason is, if it was a binding judgment, that would violate Article III. It would give to a tribunal other than this Court the authority to determine Federal law.

The third reason is in Sanchez-Llamas a

majority of this Court rejected this argument and provided explicitly, quote, "nothing in the structure or purpose of the ICJ suggests that its interpretations were intended to be conclusive on our courts.

The fourth reason is the parties in Avena were the United States and Mexico. Neither is a party to this proceeding. The argument as to why it is binding in this case is that Texas is vicariously part of the United States. That was equally true of Oregon in Sanchez-Llamas. In both cases, there's one State who is in some sense one of the parties.

The fifth reason is the Breard case was in many senses equally a judgment, in that you had the ICJ issuing an order to this Court concerning Breard, concerning his specific case, to stop his execution, and this Court concluded that that could not trump U.S. law.

And the sixth and final reason that it is not a judgment is to treat it as a binding judgment would be to cut out the President's authority not to comply. Everyone agrees, for example in the Nicaragua case, that the President retains the authority to say no, we're not going to comply.

Which is why the entire purpose of this adjudication is not to resolve something finally in a court of law, but it is rather a diplomatic measure,

much as -- much like when the United States sued Iran during the hostage crisis. We didn't believe the Ayatollah was going to listen to the ICJ and suddenly let the hostages go. We didn't -- we didn't expect that Iranian courts would give force to it, but it was helpful diplomatically to bring it to that tribunal to then put international pressure. That --

JUSTICE KENNEDY: Then this is consistent with what you've been explaining to Justice Breyer in your answer, that for 200 years we have had some treaties that are very important, but they're not self-executing; their violation may put us in violation of international law; but it is for us to determine how we are going to comply with the international obligation; and there is no obligation on the part of the State to comply with that law because it's not self-executing.

MR. CRUZ: Justice Kennedy, that is exactly correct.

JUSTICE KENNEDY: At some point I think in the course of your argument, we may get back to whether the Vienna Convention itself is or is not self-executing. I think the Solicitor General was correct in saying that that's a difficult word. I think it is self-executing in that the State has to comply

with it.

I'm not sure that it is self-executing in that the State has to accept whatever procedural framework the foreign national demands.

MR. CRUZ: I would agree with the characterization you suggest, which is that the Vienna Convention was self-executing in the sense that it didn't require legislation to go into effect, but it was not self-executing in the sense that it provided judicially cognizable rights.

But let me add a caveat to that, which is in both Breard and Sanchez-Llamas, this Court assumed the Vienna Convention created individual rights, and although Texas maintains that it did not create individual rights and the United States maintains that it did not create individual rights, we don't have to win on that proposition to prevail in this case. Even assuming it created individual rights in this case, Medellin defaulted on that claim and this Court held with Sanchez-Llamas that procedural default is consistent with the treaty.

And the real question here in this case, particularly with respect to the President's order, is whether the Optional Protocol is self-executing, the decision of the Avena court, or, as a subsequent matter,

whether the President has some sort of independent authority to make Federal law.

And in this respect --

JUSTICE GINSBURG: Well, I still -- I would like to get back to that Optional Protocol. It -- was it submission to jurisdiction? My understanding is that any two parties that can agree, can have a formed selection clause, can agree that we accept the authority of this tribunal, and then it follows from that that if you accept their authority to adjudicate, you are bound to follow its decisions. And that that seems to be understood in the world community because, is it not so that even though there are cases like Nicaragua and Iran, most ICJ judgments are indeed complied with by the nations that agree to submit to the jurisdiction of that tribunal?

MR. CRUZ: Justice Ginsburg, that is correct as a political and diplomatic matter, but in my judgment it speaks volumes that of the 166 nations that signed on to the Vienna Convention and of the 50 nations that signed on to the Optional Protocol, zero -- not a single nation -- treats ICJ judgments as binding in their domestic courts.

What Petitioners are arguing here is for an interpretation of this treaty that no other nation

gives. And in fact, if I found myself in the nation of Mexico and arrested without consular notification, I could not raise this claim in Mexico. The Mexican courts would not treat it as a defense to my criminal prosecution.

And so --

JUSTICE GINSBURG: Do you have a case that says that? A Mexican case that says that?

MR. CRUZ: I do not have a case that says that, but neither Petitioner nor their many amici have been able to point to a single instance.

JUSTICE GINSBURG: Maybe it hasn't come up.

MR. CRUZ: Given that these treaties are four decades old, that that speaks volumes that no -- no nation has accorded binding force to ICJ --

JUSTICE BREYER: Maybe these other nations have an inquisitorial system where an investigating judge collects a dossier and the fact is noted in the dossier and the investigating judge and the prosecution give it such weight as it's entitled to.

MR. CRUZ: Justice --

JUSTICE BREYER: You know that doesn't happen?

MR. CRUZ: Justice Breyer, I -- I think you could well be right, but I think that also speaks to the

peculiar nature of this. Procedural default only --

JUSTICE BREYER: In an --

MR. CRUZ: -- matters in system like the United States' where habeas allows a second bite at the apple. Most other countries don't allow criminal defendants to relitigate criminal matters, in which case procedural default matters. The other countries simply deny it altogether.

JUSTICE BREYER: Of course it matters. But the -- of course it matters. That's why when I read the -- the ICJ opinion, I read it as saying that they're not telling you to set aside a procedural default rule. What they've asked you to do is to provide, by means of the United States' own choosing, review and reconsideration of the convictions and sentences by taking account of the violation of rights.

And throughout they ask -- when you decided whether the person was really prejudiced, when you decided whether there had been forfeiture of the rights, at that time, did you ask yourself that the reason he might not have raised them was because he knew nothing about them and his lawyer knew nothing about them, because nobody ever told either about them? In which case there might be a causal connection.

As I read it, the ICJ left all that up to

you but just asked you, please, look at it again having read our opinion and keeping this in mind.

MR. CRUZ: But the ICJ's decision -- I think your question goes back to Justice Ginsburg's question about the effect of an ICJ decision.

The legal -- legal adviser to the State Department told the Senate, when it was ratifying the UN Charter, that decisions of the ICJ are "a moral obligation" and there is "no provision" for the enforcement of such decisions. And one fascinating example of this is the entire debate over the Connally Amendment. One can look in the entire course of legislative history, and it's an argument back and forth about whether it is wise to require the United States to cast a veto in the Security Council over an attempt to enforce an ICJ. And not a single senator of the entire U.S. Senate suggested the proposition that ICJ decisions might be independently enforceable. Nobody discussing that understood it that way.

JUSTICE SCALIA: Once again, there is a constitutional problem, is there not, if they are automatically enforceable?

MR. CRUZ: Absolutely.

JUSTICE SCALIA: That is conferring upon the ICJ the responsibility to decide the meaning of a United

States treaty which is United States law.

MR. CRUZ: And --

JUSTICE SCALIA: I'm rather jealous of that power.

(Laughter.)

JUSTICE SCALIA: I think it belongs in this Court. And when you have a non-self-executing treaty, there is no problem.

It becomes U.S. law when the Senate and the House pass a law which the president -- it doesn't become U.S. law because the President writes a memorandum to his Attorney General, but it does become U.S. law when a law is enacted.

MR. CRUZ: And that --

JUSTICE SCALIA: That solves the constitutional problem, but in the situation we're talking about here, I don't know on what basis we can allow some international court to decide what is the responsibility of this Court, which is the meaning of the United States law.

MR. CRUZ: Justice Scalia, that's absolutely correct.

JUSTICE BREYER: And how does the WTO differ?

MR. CRUZ: The imperative --

JUSTICE BREYER: How does the WTO and NAFTA and all our trade agreements differ?

MR. CRUZ: The WTO and NAFTA -- I mean NAFTA is not a treaty. It's a congressional agreement, but it is also adjudicating specific factual questions that deal with the application of facts to a particular circumstance. It's not interpreting the treaty and purporting to bind the United States on this is what the underlying Federal law means.

JUSTICE KENNEDY: And the United States apparently accepts the verdict of those --

MR. CRUZ: Right. Right. And it could choose not to.

JUSTICE KENNEDY: You have three different things that you have to tell us about today: That the President's authority, the effect of the ICJ, and -- and the Avena judgment, and ultimately, the force of the Vienna Convention itself.

And the only question I have that I need your help with is as to the last, and I hope that it doesn't interrupt the train of your argument.

I think the ICJ -- pardon me, the Vienna Convention is self-executing, in that it requires the States to conform to the consular notification provision.

MR. CRUZ: And we don't disagree with that.

JUSTICE KENNEDY: Suppose you have a judge who has control over a defendant who's being held in custody pending trial, and the defendant says I want to see my -- my foreign counsel. The judge says no. Can you mandate that -- assuming State procedures allow him in, couldn't you mandate that judge to require him to allow the notification to take place?

MR. CRUZ: The consequence of the argument that it doesn't create individual rights would mean that that individual defendant could not raise it in that --

JUSTICE KENNEDY: You see where I'm going?

MR. CRUZ: Yes.

And so in that circumstance, it would mean, if a judge declined to comply with that obligation, the individual defendant would not have an appealable legal error.

JUSTICE KENNEDY: If I thought he did, would I still have to rule against you?

MR. CRUZ: No, not at all. In fact, just as this Court did in Breard and Sanchez-Llamas, it assumes that the Vienna Convention created individual rights. And so we don't need to prevail on that to reach the identical outcome. Because even assuming we are incorrect concerning individual rights, the

Sanchez-Llamas holding is that procedural default respects those rights just as fully as it respects constitutional rights.

JUSTICE GINSBURG: But --

JUSTICE KENNEDY: Could I make a distinction between failing to let him see the counsel at all in my hypothetical and a demand that the procedural framework be altered? Isn't there a distinction between those two cases, do you think?

MR. CRUZ: I think that's right. I think also in your hypothetical, your hypothetical assumes a - a deliberate violation of the law which no one suggests here rather than inadvertence. And inadvertence complied with, as you suggested earlier, no prejudice whatever so. And there has -- both the Federal and State courts that looked at this concluded that there was no even arguable prejudice from the violation.

JUSTICE GINSBURG: Mr. Cruz --

JUSTICE STEVENS: Mr. Cruz, could I go back to your discussion of whether this is a judgment or not? It seems to me some of your reasons actually go to whether the -- whether it was a correct interpretation of the treaty. And if it were a judgment, would you agree that this Court would have to accept it, even if this Court disagreed with its legal analysis?

MR. CRUZ: Justice Stevens, I would not, because I do not believe consistent with Article III this Court's authority can be given away by treaty.

JUSTICE STEVENS: How is it given away to a treaty if it just says one State court must honor a judgment of a sister State even if it thinks it's dead wrong? Is it giving away its judicial authority by obeying the Full Faith and Credit Clause?

MR. CRUZ: That is provided by the Constitution. And in this instance, giving any other entity, the authority to make a conclusive determination of Federal law, that goes to the heart of the Article III power.

JUSTICE GINSBURG: Are you saying that even --

JUSTICE STEVENS: Even if it was agreed by treaty to give it conclusive effect?

MR. CRUZ: If the Senate agreed that this was self-executing, then you would have the height of the Presidency and Congress working together. But even in that situation, I would submit as a matter of separation of powers, they could not give this Court's essential role, under Marbury, to say what the law is to another body.

JUSTICE GINSBURG: Then we couldn't have a

treaty with another country on the mutual recognition and enforcement of judgment, because the other country might get it wrong, we might disagree with its interpretation of the law, and, therefore, unlike the rest of the world, the United States can't get the advantage of a reciprocal guarantee that our judgments will be respected, and in turn we will respect your judgment.

MR. CRUZ: In enforcing foreign judgments, the foreign court is not purporting to make a definitive determination of U.S. law.

JUSTICE GINSBURG: It may be that if the case turns on a question of U.S. law, and we may think, as many think about the ICJ, that they got that question wrong. Still, it's always been if you don't look behind the judgment. You say in the next case I'm certainly not going to apply that wrong interpretation. But here I'm bound by a judgment.

And that's why I questioned your use -- your heavy use of Sanchez-Llamas. I agreed with the court in that case because it was a question of interpretation. We don't have to agree with the ICJ. We were not faced with a decision, a binding adjudication, which we accept for that case only. So there's a difference between Sanchez-Llamas and this case that you appear not to

recognize in your brief.

MR. CRUZ: Justice Ginsburg, it has been the consistent position of the United States for over four decades from the day this treaty was ratified that the Optional Protocol was not self-executing, was not enforceable in U.S. courts. So it is not a judgment that has -- were this Court to treat it as -- as a judgment, it would be making that treaty self-executing. And the power to transform a non- --

JUSTICE GINSBURG: I thought you said that -- oh, you said that this is a matter of goodwill or that most ICJ judgments -- ICJ judgments, they're not binding but people comply -- nations comply with them as a matter of goodwill?

MR. CRUZ: Justice Ginsburg, that's exactly correct. And the President had a number of constitutional means at his disposal to comply, had he chosen. The -- but --

JUSTICE GINSBURG: What could -- other than -- I mean, the most logical place to have this go on is the court that rendered the judgment. It's always better for the court that rendered the judgment than some foreign court or another State court.

So what else could the President do? The ICJ did say U.S., as a matter of your own choosing. And

the President chose the most logical forum, but what else could he have done?

MR. CRUZ: There are three avenues that the President could have chosen that would have been constitutional. The first of which he could have gone to Congress and proposed a statute amending the AEDPA to allow Federal habeas review.

The second is he could have negotiated a treaty, submitted it --

JUSTICE GINSBURG: Let's start with the first one. Why should this case be in Federal court? It's a state judgment that's in question.

MR. CRUZ: This Court has made clear that the Federal Government cannot expand the jurisdiction of the State courts. There is a State --

JUSTICE GINSBURG: But you can have the Federal court overseeing the State court and telling the State what to do? That seems to me practically much more of an encroachment on State authority than to say, State courts, you do it.

MR. CRUZ: Well, and --

JUSTICE GINSBURG: -- or to say Federal courts, you do it.

MR. CRUZ: A corollary --

JUSTICE SCALIA: A lot of people think

that's exactly right, that really we expanded Federal habeas jurisdiction quite improperly. But it happens every day, doesn't it?

MR. CRUZ: It does. And a corollary to this is if Congress could pass a statute creating a Federal right to review, and that Federal right to review under the principles of Testa versus Katt would have to be respected in the State court.

JUSTICE GINSBURG: Who would be doing the review?

MR. CRUZ: Well, if it were a Federal right to review, under Testa versus Katt, both the State and Federal courts would give review. Interestingly enough, if it were a new Federal right, it would clear the jurisdictional bar because the Texas jurisdictional bar allows an exception for a new law. So if Congress passed a new law that would be jurisdiction to raise --

JUSTICE GINSBURG: A law passed by Congress saying Texas dispense with your procedural bar rules?

MR. CRUZ: A law passed by Congress saying in order to give effect to the Avena judgments the 51 Mexican nationals at issue shall be entitled to review and reconsideration of whether there was prejudice from the denial of the Vienna Convention. That law would be respected equally.

I would suggest that Testa versus Katt, which Petitioner uses, is a case which powerfully supports Texas, because the principle of Testa versus Katt was there is one Federal law that must be applied equally in Federal courts and State courts. And the State courts are not at liberty to ignore Federal law.

This is a very curious assertion of presidential power. Because the presidential power is not directed at the Federal courts. It is directed at the State courts,and the State courts alone. And I would submit is the only instance I'm aware of, of a Federal mandate that falls only on the states, singles out the states, and commandeers those judges.

In over 200 years of our nation's history I'm not aware of any other directive from the President directly to the State courts and State judges.

JUSTICE GINSBURG: So what's absent in your view is Congress. You say that all of this could have been done --

MR. CRUZ: Absolutely --

JUSTICE GINSBURG: -- and Texas could have been ordered, but the President doesn't have the authority to do it just on the basis of the ICJ,

MR. CRUZ: And Justice Ginsburg, I think a powerful parallel is the decision of this Court last

near in Hamdan. In Hamdan the President was at the height of his war powers authority. And nonetheless, this Court concluded that he could not act contrary to the will of Congress.

Here his interests are far less than prosecuting war, and yet he is asserting the authority to go it alone, despite a consistent stream of congressional disapproval, both in ratifying these treaties and saying they're not self-executing and also in passing the AEDPA.

JUSTICE GINSBURG: The not self-executing in the position of the State Department, wasn't there -- in the parallel proceedings in Oklahoma, wasn't there a letter from the current -- the then current legal adviser telling Oklahoma that this is a judgment that's binding on all courts in the United States, State and Federal, and that the President has directed Oklahoma to comply? I think that was sent both to the governor and the other officials.

MR. CRUZ: This letter was sent out to all affected States, but it is -- the United States is quite candid in what they are doing. The department to its credit describes it as "unprecedented," and it goes further, if I may read a portion of page 5 of the memo, or memo page 6, rather: The President's memorandum is

sufficient to create a binding legal rule.

The department is not hiding what they're arguing. They're not arguing the treaties require it. They're not arguing any statutes requiring it. They're saying a two-paragraph memorandum from the President to a member of the cabinet is binding Federal law.

JUSTICE GINSBURG: Which -- which letter are you quoting? Are you quoting --

MR. CRUZ: I'm quoting the United States' brief in this proceeding, page 6 of the brief. On page 5 it also describes the President's power as "establishing binding rules of decisions that preempt contrary State law."

If that is correct, there is no reason why the President could not have directed his memorandum to the Federal district courts or even to this Court, and that is an extraordinarily broad power to be asserted on behalf of the executive.

JUSTICE SOUTER: Mr. Cruz, you have frequently emphasized the non-self-executing character of the optional protocol.

Is there any rule, any positive rule in existence today either of international law or domestic law that precludes this Court from being the implementing authority as opposed to the executive or

the executive and the Senate?

MR. CRUZ: This Court has the final authority to determine what Federal law is, and so if this Court determines that that's what the treaty requires, then that be federal law. Now I would suggest that would require overruling --

JUSTICE SOUTER: These treaties including the optional protocol.

MR. CRUZ: In my judgment, if the Court reached that conclusion it would be error. But --

JUSTICE SCALIA: I think you misunderstood. I thought he was asking whether if it is -- assuming it is not self-executing, this Court can execute it.

JUSTICE SOUTER: That's right. Yeah.

MR. CRUZ: In my judgment it would be wholly illegitimate for the Court to do so.

JUSTICE SOUTER: Why?

MR. CRUZ: Because --

JUSTICE SOUTER: What's the rule -- what is the positive rule of international and domestic law that precludes it?

MR. CRUZ: The rule is a constitutional rule, that the President makes treaties the Senate advises and consents. And the limitation --

JUSTICE SOUTER: They've made the treaty.

We have got the optional protocol. Whatever the optional protocol means is Federal law.

MR. CRUZ: The limitations the Senate put on are it as much a part of the treaty as the treaty itself, and the consequences --

JUSTICE SOUTER: But you're -- my point is, my -- I'm accepting as premise of the question the limitation which you assert, i.e., non-self-executing; and my question is, may the execution, if you will, be made by this Court? Is there an independent rule that precludes this Court from that role?

MR. CRUZ: If this Court did so, in my judgment it would be usurping the role of Congress. All right? Because the essence of the decision --

JUSTICE SOUTER: I don't mean to be disrespectful of your judgment but what do you base it on -- tradition?

MR. CRUZ: The essence of the decision by the Senate to say something is non-self-executing is to say if something in this treaty is going to change U.S. domestic law, you have to come back to us.

JUSTICE SOUTER: You're saying by -- by non-self-executing, they mean you have to come back to us? The terms --

MR. CRUZ: That's exactly what it means. If

you want to change U.S. law, come to Congress.

JUSTICE SCALIA: They mean it does not automatically become part of United States law.

MR. CRUZ: Indeed.

JUSTICE SCALIA: And it follows from that, that you have to change United States law?

MR. CRUZ: Exactly.

JUSTICE SCALIA: And it is not the function of this Court to change United States law.

MR. CRUZ: That's precisely correct.

JUSTICE BREYER: If you assume it is self-executing, just for one second, I'd like to find out -- you said that the President was unreasonable in a sense of saying Texas do that over again --

I assume the reason he asked Texas to have the hearing is because the ICJ knew -- and I guess maybe he knew -- that the only hearing they'd had on this subject -- as far as I can see; I looked at it, there didn't seem to be any evidence in respect to their finding that there was no prejudice. They said well, he had a lawyer, but that lawyer later got into quite a lot of trouble, I think.

MR. CRUZ: He had two lawyers.

JUSTICE BREYER: He had two lawyers. One got into trouble, and the other didn't?

MR. CRUZ: And they vigorously defended him.

JUSTICE BREYER: Okay, they vigorously defended him.

MR. CRUZ: The only argument --

JUSTICE BREYER: Fine. Fine. My point is there's no evidence of that.

MR. CRUZ: With respect, Justice Breyer, there actually is.

JUSTICE BREYER: There is? In the first habeas hearing?

MR. CRUZ: The evidence there is --

JUSTICE BREYER: I read the whole thing.

MR. CRUZ: In our appendix there is an affidavit from the Mexican Consulate. Once the Mexican Consulate started assisting Medellin, they prepared an affidavit, and the affidavit said if we had been contacted, we would have told you not to confess; and we would have told you to get a lawyer. The problem with that is Medellin confessed within about three hours of being arrested, and even the ICJ in Avena said that notification had to occur within 72 hours.

JUSTICE BREYER: What I'm thinking of is the evidence at the first habeas hearing that led the district judge to reach his conclusion that there was no prejudice and that the procedural default was not

excused -- it's in that hearing that I didn't see what that finding was based on; and I suppose the reason that the President wanted Texas to do it is it would be easiest for Texas to go back to that.

MR. CRUZ: Justice Breyer -- it was part of the State court record, and it was the basis for saying there was no prejudice.

JUSTICE BREYER: It was in the first hearing.

MR. CRUZ: I believe it was. And it's included in our appendix four.

JUSTICE BREYER: So you think there was no reason for the ICJ to ask the President --

MR. CRUZ: It is difficult to explain.

CHIEF JUSTICE ROBERTS: Was the basis for the determination of no prejudice the fact that the Petitioner in this case had received full Miranda warnings, which went beyond what the consulate was going to tell him?

MR. CRUZ: That is completely correct, and he waived those in writing.

JUSTICE SCALIA: And he had lived in this country for how long?

MR. CRUZ: Practically his entire life. Wrote and read English and was educated in American

public schools.

JUSTICE BREYER: And what did happen to the lawyers Texas gave him?

MR. CRUZ: Both of them vigorously defended him, and in Medellin we devoted several pages of our brief to going through in considerable detail the many motions they filed. It was a vigorous defense, and yet they failed to raise this particular --

JUSTICE STEVENS: And so they have -- the Texas Court of Criminal Appeals didn't adopt a simple solution of the case, to say He got all the protection; that there's no prejudice and therefore there's no treaty violation.

MR. CRUZ: The Texas Court of Criminal Appeals didn't have it as option to say, it would have been easier, one might say, to just go along. The President is asking you to do this, make the whole thing go away; just go along. The problem is the Texas Court of Criminal Appeals had a statute, and a statute that divested of jurisdiction unless there is new Federal law.

JUSTICE STEVENS: Yes, but that statute really would not have divested -- if I understand he Texas law correctly -- if you did agree -- which you don't, I know -- that there was a preexisting Federal

obligation to honor judgments of the ICJ, then under Testa v Katt principle and Howlett opinion and others, the Texas court would have had jurisdiction.

MR. CRUZ: Although that holding would be, I would suggest, in considerable tension if not directly contrary to Sanchez-Llamas.

JUSTICE STEVENS: Well, but Sanchez-Llamas doesn't deal with the judgment. And It says a separate Federal obligation --

MR. CRUZ: Oregon is as much a part of the United States as Texas.

JUSTICE STEVENS: Then I think the Texas -- there would be jurisdiction in the Texas court to entertain this claim. I think you -- you agree with that?

MR. CRUZ: I do not, because it has to be a new claim, and if this were a judgment, the judgment --

PLAINTIFF'S CO-COUNSEL: It would be a new claim based on a new judgment which was after Sanchez -- the Chief Justice's opinion in that case.

MR. CRUZ: Let me point out one consequence of -- of the President's assertion of authority.

JUSTICE STEVENS: Well, I'm -- you just -- for -- putting the President's assertion to one side, it seems to me if you did agree -- and I know you

vigorously don't -- that there were a pre-existing Federal obligation -- an obligation of the United States to respect the judgment of the ICJ, which is -- which we think is wrong as a matter of international law; we have previously construed the treaties to the contrary -- but if there were an independent obligation to expect -- Federal obligation -- respect that judgment, it seems to me that that obligation could be enforced in Federal court.

MR. CRUZ: I don't disagree with that, Justice Stevens.

JUSTICE STEVENS: You don't.

MR. CRUZ: If -- although I disagree with the premise.

JUSTICE STEVENS: Yes.

MR. CRUZ: But if the premise were true, I don't disagree with the conclusion.

The statute allows jurisdiction where there is a new legal basis that was not previously availability. The only two potential sources of that are Avena, which we submit is a non-self-executing international law obligation, or the President's order; and, in fact, it is worth underscoring if the United States' theory is correct, there's no reason why the President needed to wait for a decision from the ICJ.

If the President has the authority to take a non-self-executive international law treaty and order it to be implemented and set aside any State law to the contrary --

JUSTICE GINSBURG: Yes, there is. We have interpreted the law, and we have said as far as what Article 36 means, we disagree with the ICJ.

MR. CRUZ: I agree with you, Justice Ginsburg, but the United States does not. The United States believes that the President has the authority to make decisions and to implement treaties -- an independent authority to create new binding law, even though the obligation is not self-executing.

CHIEF JUSTICE ROBERTS: Thank you.

JUSTICE KENNEDY: How many parties to Avena -- there were 51 -- are being held in the State of Texas?

MR. CRUZ: There are 51. There were 15 in the State of Texas. There are now 14 because 1 was under the age of 18, so is now off of death row; 51 in 9 States across the country.

JUSTICE GINSBURG: And Oklahoma has taken the opposite position, and they -- they did give the review and reconsideration?

MR. CRUZ: That's correct.

JUSTICE GINSBURG: And has any other State acted?

MR. CRUZ: Not that we're aware of, no. There have -- the 51 -- my understanding is it's down to 44. For various reasons these individuals are not on death row but, other than Oklahoma, not related to the Avena decision.

CHIEF JUSTICE ROBERTS: Well, the fact that they're on -- on death row isn't at all significant because the judgment of the ICJ purports to vacate the convictions as well; isn't that correct?

MR. CRUZ: That's exactly right; and, in fact, in Paragraph 34 of Avena it asserted the authority to annul U.S. criminal convictions. So some of the hypotheticals coming from bench, under the ICJ --

JUSTICE GINSBURG: I thought the ICJ flatly refused Mexican -- Mexico said ICJ annulled the judgment. The ICJ said no, and it didn't vacate it, either. It just said that it did a reconsideration to see whether there was prejudice.

MR. CRUZ: Justice Ginsburg, you're correct they did not order the annulment. But in paragraph 34 they asserted they could order the annulment. They simply were choosing --

CHIEF JUSTICE ROBERTS: I'm looking at page

--

MR. CRUZ: -- not to in this case.

CHIEF JUSTICE ROBERTS: I'm looking at page 186. They require review and reconsideration of the conviction and sentence.

MR. CRUZ: That's correct. So it is not just the sentence; and, in fact, they, despite the fact that their statute does not allow them to have precedent in any other cases, they said in paragraph 151:

The fact that the Court's ruling concerned only Mexican nationals cannot be taken to imply the conclusion reached in the present judgment do not apply to other foreign nationals finding themselves in situations. They were in an unprecedented act recording the authority to bind U. S. Courts in a way, to the best of my knowledge, no --

JUSTICE GINSBURG: Their very own statute, the statute setting up the ICJ, makes it clear that is not the case. They can issue a binding judgment in the particular case. It has no precedential effect for other cases, not even within the ICJ.

MR. CRUZ: But they can issue a decision that can be enforced by the Security Council. And had they issued --

JUSTICE GINSBURG: Has that ever happened?

MR. CRUZ: It has gone -- for example, in the Nicaragua case, there was an effort to take it to the Security Council there.

JUSTICE GINSBURG: And the U.S. exercised its veto.

MR. CRUZ: Correct. And that's part of a diplomatic treaty, where it's between nations is -- is that it is not binding in the sense that the domestic courts will enforce it.

Indeed, if the ICJ had asserted the power it claimed to annul U.S. convictions, under the U.S.'s theory the President presumably could have issued an order effectively pardoning State prisoners despite the fact that the Constitution limits its pardon authority to Federal crimes.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Cruz.

Mr. Donovan, you have five minutes.

REBUTTAL ARGUMENT BY DONALD F. DONOVAN

ON BEHALF OF THE PETITIONER

MR. DONOVAN: Thank you, Mr. Chief Justice.

First, there is nothing in the ratification history that suggests that Avena made any assumptions about whether or not the Optional Protocol would be self-executing. The Connally Amendment went to the compulsory jurisdiction of the ICJ, and the discussion

to which Texas has referred is entirely about the international ramifications.

In fact, the Senate specifically declined to apply the Connally Amendment to the Optional Protocol. So that gets to the question that we have been discussing here, which is:

What is the scope of the enforceability of an ICJ judgment? There are obviously constraints to that. One is illustrated by the Chief Justice's hypothetical. That is, there are affirmative constraints in the Constitution, itself.

The second is illustrated by a point I made, but Mr. Cruz misunderstood, which is that the nature of the obligation emanating from the judgment is directed at a constitutional branch such as the obligation to enforce an active statute. Obviously, that is not enforceable in court.

If the nature of the obligation is to cease hostilities, that is obviously directed to the President and is not enforceable in court. And that's illustrated by the Nicaragua case in which the ICJ issued a judgment. Congress passed a statute that said it wasn't going to comply; and the President said he wasn't going to comply.

That, in turn, applies to the third

constraint, which is the political constraint, itself. The Nicaragua case illustrates that if the ICJ issues a judgment that the United States does not want to comply with, Congress can pass a statute to say we repudiate the obligation.

So the obligations that we are talking about here in which the ICJ judgment would be enforceable by an individual fall squarely in the class of cases that this Court has decided for two centuries where an individual has a right conferred by the statute.

And he walked into a court, and he asked that court to enforce that right, and he invokes that right in -- as in the Caffa core case, the Roucher case, cases going back to the founding.

And this Court has said when the right is of a nature to be enforced in a court of justice, this Court will enforce it. And that is all Mr. Medellin is asserting here: The right to enforce a right that is eminently suitable for judicial enforcement because it goes to the judicial process, itself.

The second point with respect to Article III: It cannot be the case that this Court can never enforce -- gives away its Article III authority when somebody else enforces a judgment. We know from the Comegys and the Abba cases that we have cited that the

Court has in fact said that when the U.S. submits a case to international adjudication that international adjudication is binding and it's not reexaminable in a U.S. court.

CHIEF JUSTICE ROBERTS: I read the Comegys case, however you say it, to be for the exact opposite proposition. There they were saying, this is an international arbitration, there's no reason to go behind it.

But the question of whether or not that arbitration is binding in the bankruptcy proceeding that was at issue there was very much one for the U.S. Supreme Court to make.

MR. DONOVAN: But that's because that was not part of what the court had actually decided, or rather that the international adjudication had actually decided. You think about, if the proposition is that nobody else but an Article III court can decide a Federal question, this Court could not have decided Mitsubishi. In Mitsubishi the Court sent Federal statute antitrust claims to an arbitration panel in Tokyo and said that the result would be everyone forcible so long as the panel actually took cognizance of the claim and actually decided it.

This Court if it evaluated the claim that

Mr. Medellin is entitled to review and reconsideration as a result of the treaty obligation under 94-1 and the President's determination that that treaty obligation will be given effect, this Court would be performing a supremely judicial function, that is it would be interpreting and applying Federal law in the form of a statute, which is exactly what the Supremacy Clause requests the Court to do.

With respect to --

JUSTICE SCALIA: Put precisely, it would be making it Federal law and then applying it. If you assume it's not self-executing, somebody has to make it to domestic law. Now, Congress can obviously do it by passing a law.

But you're saying the Court can do it, can make it dmestic law and then enforce it.

MR. DONOVAN: That assumes thatit is not self-executing, yes. But the whole question here is --

JUSTICE SCALIA: Yes, yes, ys.

MR. DONOVAN: -- when we're talking about self-executing here we're saying what branch is the obligation directed to. And what the Court has said time and time again is when the obligation is of a nature to be enforced in a court of justice it is directed to the judicial authority.

JUSTICE SOUTER: Then what you are saying if I understand you is that Justice Scalia was wrong when he said that would be making it Federal law. I think you were saying that would be a -- the branch that was responsible for determining how to execute, i.e., to apply, Federal law. Is that your point?

MR. DONOVAN: That's exactly right. The thing that makes the treaty Federal law is not the Court; it's the Supremacy Clause, which makes it supreme Federal law.

CHIEF JUSTICE ROBERTS: What is the authority -- I get back to where I started. I understood you to concede that we would have authority to construe the judgment if it provided, for example, for a punitive sanction against the officers. What is the basis under your theory for that authority?

MR. DONOVAN: Well, it's settled that a treaty cannot contravene an affirmative constitutional obligation. There would be -- if there was -- if the ICJ --

CHIEF JUSTICE ROBERTS: But it can -- it can contravene our interpretation of the treaty as a matter of Federal law.

MR. DONOVAN: There are two different treaty obligations. There's a treaty obligation under the

Vienna Convention, which this court has now dispositively interpreted, and there's a treaty obligation to comply. And it's the very nature of an obligation to put a dispute to a third party that you may not agree with the result, and that does not in any way compromise this Court's Article III authority to rest that judgment on an obligation committed to by the political branches, three treaties ratified by the President and Senate that said when this country commits itself to do something we're going to do it. Now we have the President of the United States saying that it's in the paramount interests of the United States for purposes of enforcing --

CHIEF JUSTICE ROBERTS: Do we have the authority to interpret the judgment of the ICJ?

MR. DONOVAN: The courts in enforcing that judgment would. Of course that would be part of the judicial enterprise. The applicable instrument is now the Avena judgment, pursuant to the treaties and the President's determination, independent sources. In applying that judgment, there may well be interpretive questions because the Avena judgment lays down standards and requires obligations and that would be part of the judicial enterprise.

CHIEF JUSTICE ROBERTS: So we have the

authority to interpret it, we have the authority to construe whether it's carry to the Constitution, but we do not the authority to consider whether it's consistent with Federal law?

MR. DONOVAN: That's right, because that's the very nature of enforcing a judgment: You do not re-examine the merits. You take the judgment and you enforce the judgment. And it's the judicial enterprise to construe what that -- it may be a question about construing that -- what that instrument requires, what that judgment requires. But it's the judicial function in enforcing that judgment that calls upon this Article -- the Court's Article III authority, and does not in any way compromise it, which in turn goes to the question about what the judgment requires. It requires prospective review and reconsideration. The Texas court didn't suggest that Mr. Medellin had received review and reconsideration. The ICJ made it clear that it had to be prospective, and one of the fundamental reasons for that is because the judgment says that the treaty rights have to be determined on it own. Mr. Medellin is entitled to show that the violation of the treaty standing on its own two feet and not filtered through a constitutional right affected -- that he is entitled to show prejudicie.

CHIEF JUSTICE ROBERTS: Thank you, Mr. Donovan.

MR. DONOVAN: Thank you, Mr. Chief Justice.

CHIEF JUSTICE ROBERTS: The case is submitted.

(Whereupon, at 11:30 a.m., the case in the above-entitled matter was submitted.)

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